Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1996

STANLEY PLATEK, LASZLO VARGA,
SAM MCCULLOUGH, THOMAS HANEY, SR.,
MARK RIMLINGER, THOMAS VON GEIS,
HARRY WRIGHT, JOHN MALEZI,
FRANK TRIPODI, NICK ROMAN,

v. *Petitioners,*

DUQUESNE CLUB,
A PENNSYLVANIA CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Section 3(m) of the FLSA, 29 U.S.C. § 203(m), regarding the taking of a tip credit in lieu of payment of the full minimum wage, applies whether or not an employer takes the tip credit.

(2) Whether, even if Section 3(m) does not apply, an employer may divert an employee's property (tips) to its own use when such diversion reduces the employee's regular rate of pay which he receives "free and clear," per 29 C.F.R. § 531.35, below the minimum wage or reduces the amount of overtime compensation that the employee receives "free and clear" below the statutory requirement of time and one-half the regular rate of pay.

(3) Whether the Department of Labor's interpretations of the applicability of Section 3(m), and the applicability of the "free and clear" regulation, 29 C.F.R. § 531.35, vis a vis tips, are reasonable interpretations of the regulation and the FLSA and are thus controlling in this case.

PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Stanley Platek, Plaintiff/Appellant

Laszlo Varga, Plaintiff/Appellant

Sam McCullough, Plaintiff/Appellant

Thomas Haney, Sr., Plaintiff/Appellant

Mark Rimlinger, Plaintiff/Appellant

Thomas Von Geis, Plaintiff/Appellant

Harry Wright, Plaintiff/Appellant

John Malezi, Plaintiff/Appellant

Frank Tripodi, Plaintiff/Appellant

Nick Roman, Plaintiff/Appellant

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Platek et al. v. Duquesne Club, 3 Wage and Hour, Cas. 2d (BNA) 5, 1995 WL 795659 (W.D. PA)

CONCISE STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The Plaintiffs/Appellants filed a civil action on May 31, 1994, pursuant to the Fair Labor Standards Act in the United States District Court of the Western District of Pennsylvania against their employer, Duquesne Club (the "Club"), a Pennsylvania Corporation. Following the granting of summary judgment in favor of Defendant on several of the counts in two separate memorandum opinions (October 14, 1994, marked as Exhibit 1; December 13, 1995, marked as Exhibit 2) and the dismissal of the remaining counts (Exhibit 3), the Appellants appealed the opinions to the Third Circuit Court of Appeals. The Third Circuit affirmed the District Court's opinions in a Judgment Order on February 5, 1997 (Exhibit 5). A petition for rehearing by the panel and en banc was requested, and the petition was denied April 11, 1997. Appellants now seek review of the Third Circuit's decision by this Court pursuant to 28 U.S.C.A. § 1254 which provides that the Supreme Court may review judgments by the Circuit Courts of Appeal "[b]y writ of certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C.A. § 1254(1) (West 1993).

CONSTITUTION PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 1331; 29 C.F.R. § 531.27; 29 C.F.R. § 531.35; 29 C.F.R. § 531.52; 29 C.F.R. § 531.55(b); 29 C.F.R. § 531.59; 29 C.F.R. § 531.60(a); 29 U.S.C. § 201; 29 U.S.C. § 203(m); 29 U.S.C. § 203(t); 29 U.S.C. § 213(a)(20); 29 U.S.C. § 216(b); 29 U.S.C.A. § 1254(1) (West 1993); FLSA, P.L. 87-30, 75 stat. 65 (1961); FLSA, P.L. 89-601, 80 stat. 830 (1966); Section 3(m) of the FLSA; Section 3(m)(1); Section 3(m)(2); Section 3(t) of the FLSA; Section 6 of the FLSA; Section 7 of the FLSA; Section 11 of the FLSA; Section 15(a)(2) of the FLSA; Section 16(a)(5) of the FLSA; and Applicable Rules of the Supreme Court of the United States.

CONCISE STATEMENT OF THE CASE SETTING OUT THE PERTINENT FACTS AND THE BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The underlying dispute is founded upon relief sought by the Appellants under the Fair Labor Standards Act, ("FLSA"), 29 U.S.C. §216(b). Original jurisdiction over civil actions arising under federal statutes, such as the FLSA, is conferred upon the district courts of the United States of America, 28 U.S.C.A. §1331 (West 1993) (Federal Question Jurisdiction).

Defendant (the "Club") is a private club in Pittsburgh, PA, serving food and beverages to members and guests and providing other services. Plaintiffs are wait staff employees of Defendant and are commonly referred

to as "Banquet Captains." They serve meals and beverages to members and guests at what are described as "private parties." Plaintiffs also perform other duties related to the provision of those services.

Plaintiffs claim violation of Sections 3(m), 6, 7, 11(c), 15(a)(2) and 16(a)(5) of the Fair Labor Standards Act (hereinafter "Act" or "FLSA"), 29 U.S.C. §201, et seq.. Plaintiffs seek monetary damages including back pay, liquidated damages, attorneys' fees and expenses. Defendant admits that it is covered by the FLSA and subject to its provisions. The Parties agree for the relevant time period (through December 1995) that Plaintiffs receive "tips" for the services they perform as defined in the Code of Federal Regulations, 29 C.F.R. §531.52. The Parties agree that Plaintiffs are "tipped employees" as defined in Section 3(t) of the FLSA, 29 U.S.C. §203(t). The practices in dispute were in effect until December 1995, when the Club changed the "tips" previously left by its members to a "service charge."

For performance of the above-referenced duties, Plaintiffs were paid hourly rates of $4.73 an hour in 1991, $4.95 an hour effective October 1, 1992, $5.04 an hour effective October 1, 1993, and $5.13 an hour effective October 1, 1994. There was a subsequent increase in Plaintiffs' hourly rates in 1995. The applicable minimum wage was $4.25 an hour during the entire period. Defendant took no credit against the hourly wage paid to Plaintiffs on account of tips received by Plaintiffs. Section 3(m) of the FLSA permits an employer to take such credit:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of

> tips by an amount determined by the employer, not by an amount in excess of (1) 45% of the applicable minimum wage during the year beginning April 1, 1990, and (2) 50% of the applicable minimum wage rate after March 31, 1991, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.
>
> 29 U.S.C. §203(m).

Plaintiffs were paid time and one-half the above stated regular rates of pay for all hours worked which were counted by Defendant, in excess of 40 hours in a work week. In addition to the cash wages paid by the Club, Plaintiffs received tips left by the members of the Club. It is because of these tips, and who ultimately kept these tips, that this action arose.

Prior to March, 1992, Defendant played no direct part in the sharing of tips received by the Plaintiffs with other members of the wait staff. There was a voluntary tip sharing arrangement among such employees except that one management employee (a Maitre D', a position comparable to an Assistant Food and Beverage Director) demanded a share of Plaintiffs' tips and received it over Plaintiffs' objections and protest.

In March, 1992, the labor organization which represented all non-management employees of Defendant acceded to the demands of the Defendant and agreed with the Defendant that three full shares of Plaintiffs' tips were to be turned over to Defendant for use at Defendant's discretion. The agreement was superseded by a new Collective Bargaining Agreement in October, 1992.

Effective January 1, 1993, Defendant took complete control of the handling and distribution of tips received by Plaintiffs for their work on Defendant's premises. Minor amounts of cash tips given directly to Plaintiffs were not included in the agreement or taken by Defendant.

Defendant used Plaintiffs' tips to pay to the wait staff, other than Plaintiffs, fixed amounts of $15.00 to serve at private parties at lunch and $50.00 to serve at private parties at dinner. Bus persons and bartenders also received fixed amounts guaranteed by the Collective Bargaining Agreement regardless of the duties performed. Defendant distributed these amounts from the tips received by Plaintiffs. After the above amounts were distributed, the remainder was divided equally among the Plaintiffs who worked on a given day and three management employees, the Food and Beverage Director and two Assistant Food and Beverage Directors. The shares allotted to the three management employees were then utilized by Defendant as follows:

> One share is designated for the Food and Beverage Director and he/she receives one-half of that share, less an amount which is used to pay part of the guaranteed salary of an Assistant Food and Beverage Director. The other one-half

> is withheld by Defendant as an incentive for the Food and Beverage Director to meet sales and production goals set by Defendant. The remaining two management shares are given in their entirety to Assistant Food and Beverage Directors. (Defendant maintains that payment of these shares is entirely at Defendant's discretion and these shares could be retained by the Defendant at its discretion.) Three management employees share in the tip pool regardless of whether they are working or not on any given day or whether they are on vacation.

The plain result of this arrangement was that the Plaintiffs did not get to keep all their tips and that three managers – even if the managers did not wait the tables and even if they were not present – were paid these tips. The *net* result was that frequently Plaintiffs did not receive the minimum wage (the net of cash wages minus the amount taken in tips).

Plaintiffs claim that tips are the property of the employee who receives them and that pursuant to the provisions of Section 3(m) of the FLSA, tipped employees must retain all tips they receive. Plaintiffs further claim that regardless of the applicability of Section 3(m), Defendant cannot take control of Plaintiff's property (tips) for its own use to the extent that the amounts taken reduce any employee's regular rate of pay during a non-overtime week in which 40 hours or fewer are worked, to less than the applicable minimum wage for every hour worked or in an overtime week, in which more than 40 hours are worked, reduces the overtime premium paid under the FLSA to less than one and one-half times the employee's regular rate of pay.

On October 14, 1994, in response to Defendant's Motion to Dismiss Paragraph 5 of Plaintiffs' Amended Complaint for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6), Judge Alan Bloch of the Western District of Pennsylvania issued a Memorandum Opinion, Exhibit 1, finding that Section 3(m) of the FLSA did not apply unless the employer claims a tip credit. Judge Bloch did not decide if Defendant's taking of Plaintiffs' tips violated the minimum wage or overtime provisions of the FLSA.

Defendant then filed a Motion for Summary Judgment regarding Plaintiffs' claims of minimum wage and overtime violation resulting from Defendant's practice of taking Plaintiffs' tips for its own use. In response, Plaintiffs argued that even if Section 3(m) did not apply, Defendant was precluded from taking Plaintiffs' tips for its own use because tips are the property of the employee who receives them, and by taking employees' property (tips), Defendant was in violation of the Act to the extent that such taking resulted in Plaintiffs not receiving the minimum wage and/or overtime compensation to which they are entitled under the Act "free and clear" and "finally and unconditionally." 29 C.F.R. §531.35.

In a memorandum opinion issued on December 13, 1995, Exhibit 2, Judge Bloch held that since the "free and clear" regulation applied only to "wages," and that since tips are not wages, the free and clear regulation did not apply to tips. He also held that if the court considered both the tips and hourly wages that Plaintiffs received in applying the regulation, Plaintiffs received more than the applicable minimum wage even though Defendant participated in the tip pool. Judge Bloch further held that

because the Plaintiffs clearly received compensation in excess of the minimum wage, they are not protected by the free and clear regulation. He further found that because Defendant paid Plaintiffs their hourly rate of pay at time and one-half that rate for hours worked in excess of 40 hours in a work week, that the court's conclusion that the "free and clear" provisions of 29 C.F.R. §531.35 did not apply in this case, and Defendant's diversion of Plaintiffs' tip money is not relevant. (Exhibit 2).

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

While the Appellant does not have a right of review on his petition for a writ of certiorari, the Court has the discretion, under certain circumstances, to grant such a petition. Sup. Ct. R. 10 (1996); *Durham v. U.S.*, 401 U.S. 481, 91 S.Ct. 858 (1971). The reasons for the Court to grant a petition in this case are straightforward and compelling:

(1) The District Court's rulings, upheld by the Third Circuit, are directly contrary to the reasonable interpretations made by the Department of Labor regarding the applicability of Section 3(m) of the FLSA and the "free and clear" provisions of 29 C.F.R. §531.35;

(2) The rulings are directly contrary to the rulings of the Fourth and Fifth Circuits regarding Section 3(m) and to the Fifth and Sixth Circuits regarding the applicability of 29 C.F.R. §531.35 to the taking of an employee's property; and,

(3) The rulings effectively repeal the protections of the FLSA for tipped employees by allowing employers to seize any and all of an employee's tips so long as the minimum wage is paid and no tip credit is taken.

In short, the Third Circuit's position on these issues challenges well-established principles of federal law and statutory interpretation, and invites circumvention of the protection of the FLSA nationwide.

The Department of Labor has made it clear that the restrictions of Section 3(m) apply regardless of whether an employer takes a tip credit, and that the provisions of the "free and clear" regulations, 29 C.F.R. §531.35, apply to tips. A copy of these pertinent pronouncements by the Department are provided in the Appendix. Exhibit 6 is an Opinion Letter issued June 21, 1974, by the Acting Administrator. Exhibit 7 is an Opinion Letter issued November 22, 1978, by the Administrator. Exhibit 8 is an Opinion Letter issued October 26, 1989, by the Administrator.

The Court has ruled repeatedly that an Agency's interpretation of a statute over which it has explicit Congressional authority, and where Congress has not "directly spoken to the precise question at issue", are controlling so long as they are "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 U.S. 2778 (1994).

The Court has also repeatedly held that the Secretary of Labor's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the

regulation. *Auer v. Robbins*, 1997 U.S. LEXIS 1272 (February 19, 1997), quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

A brief summary of the legislative and judicial history of the tip-related provisions of the FLSA underscores the reasonableness of the Department's interpretation of these provisions and the unreasonableness of the District Court and Third Circuit's rulings.

The issues of how tips are to be treated under the FLSA was addressed by the courts as early as 1940. The Supreme Court held that if there was not an agreement as to ownership of tips received by employees in the course of their work, the tips were the property of the employee that received them. *Williams v. Jacksonville Terminal Company*, 315 U.S. 386, 397, 62 S. Ct. 659 (1940).

Prior to 1966, the restaurant industry was exempt from the minimum wage provisions of the Act. In 1966, amendments to the Act brought the restaurant industry under its minimum wage provisions for the first time. The complete exemption of restaurant employees from the minimum wage provisions of the Act was repealed. 29 U.S.C. §213(a)(20); FLSA, P.L. 87-30, 75 Stat. 65 (1961).

The 1966 amendments added language to Section 3(m) of the Act which permitted an employer to claim a credit of up to 50% of the applicable minimum wage, for tips received by an employee.

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50% of the

> applicable minimum wage rate, except that in the case of an employee who either himself or acting through his representative, shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid to such employee by his employer shall be deemed to have been increased by such lesser amount. 29 U.S.C. §203(m), FLSA, P.L. 89-601, 80 stat. 830 (1966).

The 1966 amendments also added to the Act a definition of a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $20.00 a month in tips." 29 U.S.C. §203(t), FLSA, P.L. 89-601, 80 Stat. 830 (1966).

The Administrator of the Wage and Hour Division of the U.S. Department of Labor, in regulations interpreting Section 3(m) of the 1966 Amendments and in administrative opinions, held to the position that the 1966 Amendments to Section 3(m) did not alter the holding in *Williams v. Jacksonville Terminal,* and that agreements between employers and employees under which tips received by the employees were turned over to the employer or were accounted to him to be treated as part of his gross receipts, were valid. 29 C.F.R. §531.55(b); 29 C.F.R. §531.59; Administrator's Opinion Letter No. 631, July 3, 1967, quoted in *Usery v. Emerson's Ltd.*, 80 Lab. Cas. (CCH) P. 33, 478 (E.D.Va. 1976).

In response to this opinion, employers in the restaurant industry adopted agreements with tipped employees under which the employees turned over to the employer

from their tips, or accounted to the employer, amounts equal to the minimum wage for each hour worked in the work week. The employer then used these amounts to guarantee the employee the minimum wage for all hours worked in the week, deducted and paid appropriate payroll taxes and paid the employee the remainder. In some instances, these agreements were reduced to writing and signed by the employees. *Usery v. Emerson's Ltd.*, supra. The courts also recognized the Administrator's interpretation of Section 3(m) which allowed this practice. *Hodgson v. Bern's Steak House, Inc.*, 20 W.H. 262 (BNA) (M.D.Fla. 1971).

Thus, the Club's tip pooling arrangement that is at issue in this case may have been permissible under Section 3(m) as it appeared in the 1966 Amendments to the Act. However, the 1974 Amendments to Section 3(m) – still in effect – changed that and made such arrangements invalid:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer but not by an amount in excess of 50% of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of

> tips among employees who customarily and regularly receive tips."

29 U.S.C. §203(m)

The District Court in this matter held that Section 3(m), as amended in 1974, does not apply when an employer does not take a tip credit as provided by Section 3(m). The District Court based its holding on the plain language of the statute. In light of the legislative history (above) of Section 3(m), the interpretations by the Administrator and the interpretations by other federal circuits, this was in error.

In the June 21, 1974, Opinion Letter, the Administrator directly addresses the meaning of the 1974 amendments to 3(m): "[The provision] is added to make clear the original congressional intent that an employer could not use the tips of the tipped employee to satisfy more than 50% of the Act's applicable minimum wage." (Exhibit 6, Opinion Letter, June 21, 1974, at 2.)

Lest there be any doubt on this point, the Administrator goes on to state:

> The amendments to Section 3(m) would have no meaning or effect unless they prohibit agreements under which tips are turned over to the employer for use by the employer in satisfying the monetary requirements of the Act. The specific language of Section 3(m) reinforces, specifically and clearly, the intent of Congress that an employee who receives $20.00 a month in tips is a tipped employee and that the employer and employee cannot agree to remove him from that category. *Id.*

The Administrator further emphasizes the point that an employee cannot waive his right to the minimum wage. *Id.*, at 3, citing *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945).

The Administrator further clarifies *who* is covered by 3(m): "It is our opinion that an employee who is subject to the Act's pay standards and who meets the statutory definitions of a tipped employee is subject to Sections 3(m) and (t)", id., and that where such an employee "has retained all tips which he receives from customers . . . he must receive *in addition* to such tips remuneration from his employees of at least 50 percent of the statutory minimum wage . . . ", *Id.*, emphasis added.

Importantly, the Administrator does not make applicability of section 3(m) depend on whether an *employer* does or does not take a credit, but on whether the *employee* is covered by relevant portions of the Act. This is the direct opposite of the District Court's approach. Moreover, the clear inference from the Administrator's statements is that tipped employees *must* retain their tips in addition to being paid at least 50% of the minimum wage.

The Acting Administrator's June 21, 1974 opinion letter has been relied upon by the Fourth and Fifth Circuits. In *Richards v. Marriott*, 549 F.2d 303, 80 Lab. CAS. (CCH) p. 33, 477 (4th Cir. 1977) cert. denied 433 U.S. 915 (1977), the court held that a tip back agreement used by the defendant in that case was invalid. The court agreed with the District Court that tips belong to the employee to whom they are left. The court did not relate that statement in any way to the condition that it applied only

when the employer claimed a tip credit. Marriott had claimed no tip credit but merely guaranteed the federal minimum wage if the employee did not make it in tips. *Id.*

As stated by the court in *Marriott*, "The 1974 Amendments were enacted on April 8, 1974, and on June 21, 1974 the Acting Administrator of the Wage and Hour Division of the United States Department of Labor issued an unpublished opinion letter in response to questions by the National Restaurant Association. This opinion letter was widely circulated in the restaurant industry. The opinion gave notice to Marriott and other employers that tips had to be retained by employees, that agreements remitting tips to employers were henceforth invalid and that the employer had to pay, regardless of the amount of tips, *at least* one-half the minimum wage." (emphasis added) *Richards v. Marriott Corp.*, at 304.

In *Marriott*, the employer underwrote the minimum wage by agreeing to pay it or make up the difference between tips received and the statutory minimum wage and claimed no tip credit under Section 3(m). The court held that tips belong to the employee to whom they are left and that after the 1974 Amendment agreements remitting tips to the employer were invalid. *Marriott* at 304.

The court characterized *Marriott*'s argument that because it claimed no tip credit it could satisfy up to 100% of its minimum wage obligation from tips as "nonsense." *Id.* at 305. The court recognized the absurdity of allowing an employer who claims no tip credit under

3(m) a 100% credit, while only allowing a 50% credit to an employer who complies with 3(m)(1) and (2).

A district court in the Fourth Circuit again, in *Usery v. Emerson's Ltd.*, adopted the position of the court in *Richards v. Marriott*, regarding "tip back" agreements. *Usery v. Emerson's Ltd.*, op cit. Similarly, the Fifth Circuit has ruled that where the employer took and did not return all tips of the employees, the practice was violative. *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464 (5th Cir. 1979), citing *Richard v. Marriott*, supra. District Courts have similarly ruled. See, e.g., *Donovan v. Tavern Talent and Placements, Inc.*, 104 Oab. Cas. (CCH) page 34, 773 (D.Colo. 1986).

In *Emerson's*, the court examined whether tip back agreements in existence prior to the effective date of the 1974 Amendments were still permissible in light of the changes in Section 3(m). The employer specifically rejected the tip credit offered by Section 3(m) as being of no benefit to it and did not want the tip credit to be applicable to it. The employer further claimed that by rendering the tip credit inapplicable to it, the employer was in the same position as it was prior to the 1974 Amendments and free to meet its entire minimum wage obligation from tips.

Emerson's had tip-back agreements with its employees under the provisions of the 1966 Amendments which were allowed under the earlier opinion of the Wage and Hour Administrator. Emerson's took the position that by not claiming a tip credit as stated above, the provisions of the 1974 Amendments that required that employees retain all of their tips did not apply, and that it

could continue its practice of meeting its entire minimum wage obligation from employees' tips. In rejecting this argument and holding that the tip back agreements were invalid, the court said that if this argument were accepted, the 1974 Amendments to Section 3(m) effectively meant nothing. *Emerson's*, op cit.

This result, which is expressly rejected by the courts in *Marriott, Emerson's* and *Barcellona,* is precisely the result which would be permitted under the District Court and Third Circuit's ruling in this case. The ruling would allow employers to eschew claiming a tip credit, pay the minimum wage and then seize their employees' tips to pay the wages to the tipped employees, to pay salaries and incentive bonuses to management – or for whatever purpose desired.

On November 22, 1978, another opinion letter was issued. Exhibit 7. Again, the Administrator emphasized, in direct reference to Section 3(m), that the tip "becomes the property of the "tipped employee" in recognition of whose service it is presented by the customer." *Id.* at 2. The Administrator also removed any doubt about whether the tip retention requirements of 3(m) are dependent upon the employer taking or not taking a tip credit:

> The tip retention requirement of Section 3(m) applies regardless of whether the employer elects to take credit for tips received. *Id.*

On October 26, 1989, the Administrator issued yet another opinion letter, WH-536, which squarely addresses the issues in this case. Exhibit 8. In Opinion Letter WH-536, the Administrator deals with the applicability of the FLSA to tip pooling arrangements if the employer

does not claim any tip credit. The question answered by the Administrator was posed by an employer who paid employees at least the minimum wage without regard to the tips they received and proposed the sharing of the tips with other employees who do not customarily and regularly receive tips.

The Administrator responded by affirming the interpretation of Section 3(m)(2) that tips are the property of the employee to whom they are given regardless of whether the employer claims no tip credit and that the wage of a tipped employee is at least the minimum wage plus all the tips he receives. The Administrator goes on to state that:

> If there is not a valid tip pool (i.e., tips are shared with non-tipped employees or are recovered by the employer under employer mandate) the employee would, in effect, contribute part of his/her property to the employer or to other persons for the benefit of the employer, with the result that the employee would not have received the full minimum wage "free and clear" as required by 29 C.F.R. §531.35. *Id.* at ___.

Importantly, the Administrator goes on to illustrate how violations would occur. These illustrations apply directly to the instant case, specifically, by showing that even if the wage actually paid by the employer exceeds the minimum wage the net wage received – after subtracting the tips taken by the employer and not returned to the employee – can be less than the minimum wage. *Id.* at 3.

Thus, contrary to the District Court's holding, it is clear under both the opinions of the Administrator of the

Wage and Hour Division and of the courts relying on those opinions, that the 1974 Amendments to Section 3(m) of the Act unequivocally bar any agreement under which an employer may appropriate the tips of a tipped employee for his own purpose, whether it be to pay the wages of the employee himself or the wages of other employees. This is the case regardless of whether the employer takes the tip credit available to him under Section 3(m). The employers in *Marriott, Emerson's Ltd., Barcellona* and *Tavern Talent* took no tip credit but used the tips of the employees to pay the wages of the employees. Those agreements were held invalid despite the fact that the employees eventually received all of their tips. In this case, the Club's practice is more egregious in that the Banquet Captains are deprived of their tips which the Club uses for its own purposes.

With regard to the "free and clear" issue, the District Court has held that although the Regulation which provides that wages must be paid "free and clear" requires that an employer may not require an employee to "kick-back" part of his wages if the "kick-back" reduces the employee's hourly wage below the minimum wage, the "free and clear" Regulation does not apply in this case because the FLSA and applicable regulation distinguish between payments that constitute "wages" and those that constitute "tips". District Court Opinion, Exhibit 2. *See* 29 C.F.R. §§531.27; 531.35; 531.60(a).

By drawing this distinction, the District Court has effectively repealed the minimum wage and overtime provisions of the Fair Labor Standards Act, not only in regard to an employer's right to take tips (property) from tipped employees for its own use but in regard to every

employee who is entitled to the protection of the Act. If an employer may seize an employee's "property" for its own use by distinguishing the "property" from "wages" paid, no employee's property or that of his family is safe from seizure. If the District Court is correct, an employer may pay an employee his wages and recover their value from property other than the wages. For example, an employer could pay proper minimum wages and overtime compensation to an employee and require, as a condition of continued employment, that the employee return to the employer an equivalent amount from any source (property) other than the employee's "wages" received from that employer. The "property" returned could be in cash from a wife's or child's earnings at another job, or in the form of other "property" such as tools, equipment or uniforms.

There is nothing to distinguish "tips" from any other "property" of an employee and the District Court gives no explanation of a distinction other than that "tips" are not "wages". Neither are uniforms or tools "wages" but the courts have consistently held, in conformance with the "free and clear" Regulation of 29 C.F.R. §531.35, that an employee cannot be required to provide uniforms or tools which are required by the employer or necessary for the performance of the employer's work. No court has made the distinction as to the source of the money with which the uniforms or tools were purchased.

For example, the district court, in *Reich v. Chez Robert, Inc.*, 821 F.Supp. 967 (D.C. N.J. 1993), *remanded on other grounds*, 28 F.3d 401 (3rd Cir. 1994), held that waiters and waitresses who were required to purchase and maintain uniforms as a requirement of employment, were entitled

to be reimbursed for the cost of purchase, replacement and maintenance of the uniforms to the extent that such cost reduced the weekly wage received by the employees below the lawful minimum wage. *Id.*, at 973. The Court did not distinguish whether these costs were expended from the cash wages received by the employees, from tips received or from any other source. The Court found the practice violative although the employer maintained that most employees owned the uniforms from other jobs previously held by them when they were employed by him. *Id.*

In a situation where waitresses were required to purchase uniforms prior to the beginning of employment, the Court found that if the purchase reduced their wages below the minimum wage in the first week of employment, the practice was violative. *Marshal v. Root's Restaurant, Inc.*, 667 F.2d 559 (6th Cir. 1981). In that case, the employees clearly did not expend "wages" paid by the employer but expended their property (cash) to buy the uniforms prior to their being employed by the employer.

In another case, the court found that where homeworker seamstresses paid for equipment to be used in their work and the purchase brought their wages below the minimum wage, the cost of the equipment was added to the back wages due to the employee. No distinction was made as to whether the equipment was bought with "wages" paid by the employer or other resources. *Martin v. Albrecht*, 802 F.Supp. 1311, 1317 (W.D. PA 1992).

Other employers have tried to make a distinction between wages paid and amounts kicked-back and the courts have held such practices to be violative of the

FLSA. A liquor store owner attempted to recover cash register shortages from employees and to distinguish the kick-backs from wages paid by an agreement with the employees that the kick-backs would not be deducted from wages but were repayments of a valid debt owed to the employer. The kick-backs were by agreement not to be used to determine whether the employee received the Federal Minimum Wage or to be considered part of the employee's basic rate of pay. The shortages were to be considered a valid debt owed to the employer by the employee "unconnected with the payroll procedures and not to be considered as payroll deductions". The Fifth Circuit held the practice to be violative of the FLSA regardless of whether it was allegedly voluntary and regardless of whether the employee paid the alleged "valid debt" out of his wages *or other resources*, when the effective rate of pay was reduced below the required minimum wage. *Mayhue's Super Liquor Stores v. Hodgson*, 464 F.2d 1196 (5th Cir. 1972) (emphasis added). The court held that the agreements were illegal to the extent that they tended to shift part of the employer's business expense to the employees and reduced their wages below the statutory minimum wage. *Mayhue*, at 1199.

It is the act of an employer shifting part of the employer's business expense to the employee that gives rise to a violation of the Act, and of the "free and clear" regulation, whether it is in cash kick-backs or the purchase of uniforms, tools or equipment. To the extent that the amount of the expense so shifted reduces the wages paid to the employee below statutory requirements, a violation results. In this case, the Club admittedly takes the property of the Banquet Captains in the form of their

tips and uses them to meet its business expenses. The question then becomes whether this shifting of expenses reduces the net cash wage below the minimum wage.

Unfortunately, in what amounted to dicta, the District Court concluded that there would be no violation even assuming applicability of the "free and clear" regulation because the Banquet Captains made some $36,000.00 per year. Exhibit 2 at 4. This is an inherently contradictory position: earlier the court had ruled tips are not wages and now it assumes they are wages for purposes of "free and clear."

Moreover, simple math shows how violations can and did occur. First it is assumed the Captains were paid about $12,000.00 annually by the Club (assuming $5.04 per hour in 1993/2,080 hours per year). Yet, in 1993 alone over $70,000.00 in tips was taken from the Banquet Captains and paid to the three managers. Exhibit 9, Excerpts of Expert Report of John O'Brien (offered in opposition to Summary Judgment), at p. 3 (see row labeled "1993 Totals"). Assuming this money was taken equally from the ten Captains, this would mean some $7,000.00 was effectively taken from the cash wages of each Captain for 1993 alone ($70,000.00 \ 10 = $7,000.00), resulting in obvious minimum wage violations ($12,000.00 wages – $7,000.00 reduction = $5,000.00 net wage, or a wage of approximately $2.50 per hour, well below the minimum wage.) Regardless, because of the District Court's erroneous ruling that, as a matter of law, tips are not covered by the "free and clear regulation," a proper analysis of whether violations occurred, and how much, must await reversal.

The clear import of the Administrator's opinions, together with the decisions of the various Courts of Appeal are:

> (1) Section 3(m) applies to tipped employees regardless of whether the employer takes a tip credit; and,
>
> (2) The "free and clear" regulation, 29 C.F.R. §531.35, applies to any property of the employee, including tips, and not merely cash wages.

The rulings of the District Court, upheld by the Third Circuit, run directly opposite. Yet, there has been no adequate analysis by either court, in accordance with *Chevron*, op cit., whether the Agency's interpretation of 3(m) is unreasonable, or any analysis whatsoever, in accordance with *Auer*, op cit., that the Administrator's interpretation of *its own regulation*, 29 C.F.R. §531.35, is "plainly erroneous." It is submitted that any such analysis, if done in accordance with this Court's earlier pronouncements, would necessarily reach the conclusion that the Administrator's interpretations, and the interpretations upheld by other Courts of Appeal, are indeed controlling.

The consequences of allowing the present rulings to stand are obvious: employers with tipped employees can and will ignore the FLSA and implementing regulations by simply not invoking the 3(m) tip credit, paying a *cash* minimum wage and seizing any and all tips, or other employee property, they can for whatever the purpose.

WHEREFORE, Petitioners request this Court grant certiorari.

Respectfully submitted,

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